Supreme Court, U.S.
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No. 86-274

IN THE

Supreme Court of the United States

October Term, 1986

GEORGE SARKISIAN, JOHN SARKISIAN, NORMAN PRESKITT, SARCO INDUSTRIES, INC., CHARLOTTE STREET BUILDERS, INC., and SARKISIAN BROTHERS, INC.,

Petitioners,

against

THE TRAVELERS INDEMNITY COMPANY, as Assignee of Judgments against Midstate Constructors, Inc. to enforce certain Judgments,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari

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Question Presented.

Is a state court action which does not set forth a federal claim, either on the face of the complaint, or by fair inference from the complaint, removable to federal court under the doctrine of artful pleading?

Parent Affiliates of the Travelers.

The Travelers Insurance Company
Keystone Massachusetts Life Insurance Company
The Travelers Life & Annuity Company
The Travelers Life Insurance Company
The Travelers Indemnity Company
The Charter Oak Fire Insurance Company
The Phoenix Insurance Company
The Travelers Indemnity Company of Rhode Island
The Travelers Indemnity Company of America
The Travelers Indemnity Company of Illinois
The Constitution State Insurance Company
Travelers Reinsurance Company of Bermuda, Limited
The Travelers Syndicate #1, Inc.
The Travelers Lloyds Insurance Company
The Travelers Illinois Syndicate, Inc.
Bankers and Shippers Insurance Company of New York
Travcon, Limited
Travelers Life Insurance Company of Canada
Travelers Indemnity Company of Canada
The Travelers Corporation of Bermuda, Limited
The Travelers Life Insurance Company International, Ltd.
Travelers Life Insurance Company Overseas, Limited
The Travelers Corporation of Asia, Limited
The Prospect Company
Keystone Custodian Funds, Inc.
Travelers Mortgage Securities Corporation
Travelers Mortgage Services, Inc.
Terra Nova Insurance Company
LaMetropole, S.A.
Adria-Tic International Holding, S.A.
Constitution State Management Company
Constitution Plaza Incorporated

Derby Advertising Incorporated
Massachusetts Companies, Inc.
Plaza Corporation
TIC Auto Body Company Incorporated
Travelers Asset Management International Corp.
Travelers Equities Sales Incorporated
Travelers Investment Management Company
The Travelers Marine Corporation
E. B. S., Inc.
Securities Settlement Corporation
Travelers Corporation (U.K.), Ltd.
Travelers Hill Samuel International, Limited
First Life Insurance Company, Limited
Caribbean Atlantic Life Insurance Company Trinidad and Tobago, Ltd.
Keystone Securities Co., Inc.
Keystone Massachusetts, Inc.
Keystone Real Estate Company, Inc.
Keystone Provident Financial Services Corporation
Keystone Provident Life Insurance Company
TMC Realty Partners, Inc.
Fiduciary Investment Company, Inc.
MassCo Investment Management Corporation
Auger Insurance Agency, Inc.
Carpenter Bros. Insurance Agency, Inc.
E. Broox Randall & Sons, Inc.
Travelers General Agency of Puerto Rico, Inc.
Four S Corporation
Hilstead Insurance Agency, Inc.
Joseph A. Wynne Agency
Syd Tozier & Associates, Insurance Brokers, Inc.
Arthur B. Fowler Agency, Inc.
Exsure, Inc.
William F. Connelly, Jr., Inc.
Cornutt & McIntire Insurance, Inc.

William F. O'Connor, Inc.
Charles A. Boyer, Inc.
H.C. Copeland and Associates, Inc.
H.C. Copeland and Associates Equities, Inc.
H.C. Copeland Administrative Services, Inc.
Employee Retirement Income Systems Company, Inc.
Travelers American Real Estate Co., Ltd.
Prospect Management Services Co.
Dugdale of Nebraska, Inc.
89th & York Ave., Corp.
Panther Valley, Inc.
Panther Valley Service, Inc.
Panther Valley Country Club, Inc.
Pequest Sewer Company
Pequest Water Company
Travelers Canada Corporation
Travelers Syndicate #1, Inc.
Connecticut Fire Insurance Company
Travelers Insurance Company of Illinois
Constitution State Service Company
Fund Administrators, Inc.

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986.

GEORGE SARKISIAN, JOHN SARKISIAN, NORMAN PRESKITT, SARCO INDUSTRIES, INC., CHARLOTTE STREET BUILDERS, INC., and SARKISIAN BROTHERS, INC.,

Petitioners,

against

THE TRAVELERS INDEMNITY COMPANY, as Assignee of Judgments against Midstate Constructors, Inc. to enforce certain Judgments,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari.

Statement of the Case.

There are several substantial inaccuracies in Petitioners' Statement of the Case. Petitioners characterize Respond-

ent's dismissed RICO action as an action by a surety company against its "bonding clients" for damages resulting from "Midstate's failure to complete projects and pay suppliers on construction projects for which Respondent had issued performance and payment surety bonds." This describes an action that a surety might bring against its indemnitors to recover for losses incurred pursuant to its obligations under payment and performance bonds. Respondent's RICO action, however, sought damages against certain corporations and some of their directors, officers, and/or majority shareholders, for damages resulting from the defendants, through the commission of two or more acts constituting a pattern of racketeering activity, directly or indirectly investing in, for maintaining an interest in, an enterprise the activities of which affect interstate commerce (*Moss v. Morgan Stanley,* 719 F.2d 5, cert denied 465 US 1005).

As this Court has held, a RICO Complaint must allege elements beyond those alleged in "garden variety fraud" (*Sedima, S.P.R.L. v. Imrex Company, Inc.,* ____ US ____, 105 S. Ct. 3275). It must also allege elements beyond breach of contract or an obligation to indemnity. Respondent's Complaint did so. Although Respondent's RICO Complaint was dismissed on the basis of *Sedima, S.P.R.L. v. Imrex Co.,* 741 F.2d 482, it had withstood a previous motion to dismiss for failure to state a cause of action. The Complaint was found to meet the requirements of *Moss v. Morgan Stanley, supra,* which go significantly beyond the requirements of an action under New York State's Debtor and Creditor Law.

There are also several inaccuracies contained in the footnotes to Petitioners' Statement of the Case. In footnote 2, it is stated that Respondent's Complaint in the

"consolidated cases" seeks "to recover for a portion of its claim in the instant action." Respondent's Complaint in the "consolidated cases" is an action on the General Agreement of Indemnity signed by some of the Petitioners, for losses which are covered by said Agreement of Indemnity. It is a contract action. It has survived a motion by Petitioners, made in 1983, for consolidation with the RICO claim. Hon. Howard G. Munson, Chief Judge, held, in denying that motion, that there was sufficient difference in the legal and factual issues between the two cases, that they should not be consolidated for trial. Since Petitioners are arguing that the instant action is merely a restatement of the RICO claim, and since a United States District Court has held that the RICO action and the "consolidated cases" had significant differences in the legal and factual issues, it is clearly not correct to say that Petitioners are seeking to recover for the same claim in the "consolidated cases" and in the instant case.

Footnotes 5 and 6 to Petitioners' Statement of the Case are an attempt by Petitioners to demonstrate that the state court Complaint which is the subject of this petition fairly implies the elements of a RICO cause of action. This argument must be reviewed in light of the holding of the Second Circuit that "the elements of Travelers' state law claims do not include 'a pattern of racketeering activity' or operation of an 'enterprise,' which are elements of the RICO claim, 18 U.S.C. Section 1962" (page 15a of the appendix to the Petition for the Writ of Certiorari). Apparently, Petitioners are asking this Court to overturn the Second Circuit's holding on this point. However, the accuracy of this holding is not raised as one of the questions presented by Petitioners. In fact, Petitioners' first question presented for review states, as a fact, that "the state court pleading alleges all the elements of a cause of action

under the Racketeer Influenced and Corrupt Organizations Act." In their second question presented for review, Petitioners state that "the state court plaintiff previously brought its claim in federal court." Both of these statements clearly conflict with the Second Circuit's holding on this point. As more fully set forth below, this point is crucial to this Court's determination of whether a Writ of Certiorari should issue in this case.

Argument.

Petitioners raise three points in support of their Petition for a Writ of Certiorari. Two of these points are predicated on the assumption that Respondent's state court claim in this action is, in fact, a federal claim. This position is stated as a fact in both of the questions presented, and in both of the points in the Petition for the Writ of Certiorari. For example, on page 10 of the Petition, it is stated "the Second Circuit's recitation of the background of this action leaves no doubt that the origins and substance of Respondent's claims in the RICO action and this action are identical." This is directly contrary to the Second Circuit's statement in the same opinion that "the elements of Travelers' state law claims do not include 'a pattern of racketeering activity' or operation of an 'enterprise,' which are elements of the RICO claim, 18 U.S.C. Section 1962." This determination by the Second Circuit that the Respondent's state law claim did not set forth a federal claim, is the basis for the Second Circuit's holding that removal was not proper in this case. This in no way differs from the Ninth Circuit's holding in *Salveson v. Western States Bank Card Association,* 731 F.2d 1423. There may or may not be some differences between the rule regarding the relationship between the master of the complaint rule and the doctrine of artful pleading in the

Ninth Circuit and in the Second Circuit. Petitioners maintain that the Second Circuit's "virtually identical" test is narrower than the test in *Salveson*. However, whichever holding is applied to the procedural history of this litigation, it is clear that removal was improper.

In *Salveson* and in *Federated Department Stores, Inc. v. Moitie,* 452 US 494, the procedural history was as follows: A plaintiff had an antitrust claim which could be pursued under either state law or federal law. The plaintiff elected to sue in federal court, for a violation of federal antitrust statutes. The plaintiff was unsuccessful. The plaintiff subsequently brought an antitrust claim in state court. Under the doctrine of artful pleading, it was held in both *Salveson* and *Federated Department Stores* that, since the plaintiff had previously elected to pursue his antitrust claim in federal court, that claim was now a federal claim. It was, therefore, removable, and, once removed, it was properly dismissed on the basis of *res judicata*. The allegations made in the state court Complaints, at least to the extent of the antitrust causes of action, were sufficient to constitute an antitrust claim under federal law.

This is the fundamental distinction between both *Salveson* and *Federated Department Stores,* and the instant case. The Second Circuit, following *Federated Department Stores,* analyzed the state court Complaint, and it determined that it lacked certain elements necessary for a federal claim. These elements are described with particularity in the Second Circuit's opinion (page 15a of the appendix to the Petition). This is not a situation in which the state court claim, which is brought under the New York State Debtor and Creditor Law, tracks the allegations of a previous federal claim. Therefore, this state court claim has not been federalized. Indeed, although the

Second Circuit did not have to reach this point, it is doubtful that a claim setting forth allegations sufficient to sustain a complaint under New York State's Debtor and Creditor Law would be sufficient to state a cause of action in a federal court action. If the tests applied by the Ninth Circuit in *Salveson* had been applied by the Second Circuit in this case, the same result would have been reached.

The Petitioners rely on the Second Circuit's use of the phrase "virtually identical" in finding a distinction between the Ninth Circuit's and the Second Circuit's interpretations of *Federated Department Stores*. Whatever significance this phrase may turn out to have in later cases in the Second Circuit, it is not the basis for a different result having been reached in the Second Circuit than what would have been reached in the Ninth Circuit on this record.

Although the separate state court claims in *Salveson* were also removed to federal court, they were removed on the basis of pendent jurisdiction. Neither *Salveson* nor *Federated Department Stores* provides any basis for a claim that a state court complaint which does not state a federal claim, but which does arise from some of the same facts as a previously dismissed federal claim, is properly removable to a federal court.

Respectfully submitted,

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Appendix A—Order of Judge Munson, Dated November 22, 1983.

UNITED STATES DISTRICT COURT,

NORTHERN DISTRICT OF NEW YORK.

THE TRAVELERS INDEMNITY COMPANY,

Plaintiff,

v.

GEORGE K. SARKISIAN, JOHN SARKISIAN, NORMAN PRESKITT, IVY MECHANICAL & ELECTRICAL ASSOCIATES, INC., SARKISIAN BROTHERS, INC., SARCO INDUSTRIES, INC., SARBRO EQUIPMENT CORP., and JOHN DOE and RICHARD ROE, said names being fictitious but meant to designate the officers, employees and/or agents of the aforesaid defendants, presently unknown to the plaintiffs, who participated in the acts set forth herein,

Defendants.

83-CV-1034

Appearances:

Couch & Howard, P.C., Attorneys for Plaintiff, 75 State Street, Albany, NY 12207. Of Counsel: Leslie F. Couch, Esq.

Ball & McDonough, P.C., Attorneys for Defendants, 8th Floor, Centre Plaza, Corner Henry & Chenango Streets, Binghamton, NY 13902. Of Counsel: Kevin F. McDonough, Esq.

HOWARD G. MUNSON, C.J.:

ORDER

The Travelers Indemnity Company filed the instant lawsuit against various defendants charging them with violations of the federal racketeering laws, 18 U.S.C. § 1961 *et seq.* Presently before the court is defendants' motion to dismiss the complaint pursuant to Rule 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure. Alternatively, defendants seek an order pursuant to Rules 9(b) and 12(e) of the Federal Rules of Civil Procedure compelling the plaintiff to file a more definite statement and to plead fraud with particularity. Additionally, defendants seek an order pursuant to Rule 12(f) of the Federal Rules of Civil Procedure striking portions of the plaintiff's complaint alleged to be redundant, immaterial, impertinent and scandalous. Finally, defendants seek consolidation or joinder of the present action with two actions previously consolidated by this court. For the reasons that follow the court denies all the motions.

To state a claim for damages under RICO a plaintiff has two threshhold pleading burdens. First, he must allege that the defendant violated a substantive criminal provision of the RICO statute. *See* 18 U.S.C. § 1962 (1976). Second, he must allege the existence of seven constituent RICO elements: (1) that the defendant (2) through the commission of two or more acts (3) constituting a pattern of (4) racketeering activity (5) directly or indirectly invests in, or maintains an interest in (6) an enterprise (7) the ac-

tivities of which affect interstate commerce. *See Moss v. Stanley,* No. 83-7120, slip op. (2d Cir. Sept. 9, 1983). Despite the fact that RICO was enacted in a multifaceted campaign against the pervasive presence of organized crime in America, the Second Circuit flatly held in *Moss* that the statute does not premise a RICO violation on proof or allegations of any connection with organized crime. *Id.*

A cursory reading of plaintiff's complaint reveals that the constituent elements of a RICO claim have been properly pleaded. Accordingly, defendants' motion pursuant to Rule 12(b)(6) is denied. Additionally, the court finds that plaintiff has set forth his various causes of action, including fraud, with sufficient detail to allow the defendants to form a responsive pleading. Accordingly, defendants' motions pursuant to Rules 9(b) and 12(e) are hereby denied.

With respect to defendants' assertion that certain portions of plaintiff's complaint should be stricken because they include redundant, immaterial, impertinent and scandalous material, the court finds that this information is relevant to plaintiff's pleading burden of establishing an "enterprise" and "pattern of racketeering" activity. Moreover, although some of this material is undoubtedly redundant, the court finds that its inclusion in the complaint will not result in any prejudice to the defendants. Accordingly, defendants' motion pursuant to Rule 12(f) is hereby denied.

Finally, to the extent that the instant action involves factual and legal issues which are considerably more complex than those presented in the action previously consolidated by this court, and because the parties are not identical in

both actions, defendants' motion for consolidation or joinder is hereby denied.

It is so Ordered.

Dated: November 22, 1983
Syracuse, New York

HOWARD G. MUNSON
Chief U.S. District Judge